

Supreme Court, U. S.

FILED

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MICHAEL RODAK, JR., CLERK

IN THE
Supreme Court of the United States

OCTOBER TERM, 1978

NO.

77-1249

ROBERT CASPER BISPING,

Petitioner

v.

COMMONWEALTH OF VIRGINIA

Respondent

PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF VIRGINIA

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COMMONWEALTH OF VIRGINIA,
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PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF VIRGINIA

Petitioner, Robert Casper Bisping,
prays that a writ of certiorari issue to
review the judgment of the Supreme Court
of Virginia.

OPINIONS BELOW

The Supreme Court of Virginia handed

down an opinion on January 13, 1978.

The opinion has not yet been printed.

JURISDICTION

The date of the judgment of the Supreme Court of Virginia was January 13, 1978. No re-hearing was requested. No order was entered granting an extension of time in which to petition for certiorari. The statutory provision believed to confirm this Court jurisdiction to review the judgment in question by writ of certiorari is 28 U.S.C. 1257 (3).

QUESTIONS PRESENTED FOR REVIEW

I. Does §19.2-135, Code of Va., requiring every recognizance taken of the accused shall be upon the condition, in addition to appear to answer for the defense of which he was charged before the Court and that he shall not depart from the State of Virginia without leave of

the Court, that he shall keep the peace and be of good behavior until the case is finally disposed of, violate the Fifth and Fourteenth Amendments to the United States Constitution?

II. If the above statute is constitutional, was said statute unconstitutionally applied against this defendant, by reason of the Court declaring a forfeiture of the \$50,000.00 bail bond?

STATUTES INVOLVED

§19.2-135, Code of Va., states:

"...any recognizance taken of the accused shall be upon the following conditions: (1) that he appear to answer for the offense for which he was charged before the court or judge before whom the case will be tried at such time as may be stated in the recognizance and at any time or times to which the proceedings may be continued and before any court or judge thereafter in which proceedings on the charge are held; (2) that he shall not depart from the Commonwealth without leave of such court or judge; and (3) that he shall keep the peace and be of

"good behavior until the case is finally disposed of..."

§19.2-143, Code of Va., reads:

"Where default recorded; process on recognizance; when copy may be used. - When a person, under recognizance in a criminal case, either as party or witness, fails to perform the condition thereof, if it be to appear before a court of record, or court not of record, a hearing shall be held upon reasonable notice to all parties affording them opportunity to show cause why said recognizance should not be forfeited. If the court finds the recognizance should be forfeited, the default shall be recorded therein, unless, the defendant be brought before the court within thirty days of the findings of default. After thirty days of the finding of default, his default shall be recorded therein, and if it be to appear before a court not of record, his default shall be entered by the judge of such court, on the page of his docket whereon the case is docketed unless the defendant has been delivered or appeared before the court. The process on any such forfeited recognizance shall be issued from the court before which the appearance was to be, and wherein such forfeiture was recorded or entered. Any such process issued by a

judge when the penalty of the recognizance so forfeited is in excess of five thousand dollars shall be made returnable to the circuit court of his county or city, and when not in excess of five thousand dollars it shall be made returnable before, and tried by, such judge, who shall promptly transmit to the clerk of the circuit court of his county or city wherein deeds are recorded an abstract of such judgment as he may render thereon, which shall be forthwith docketed by the clerk of such court.

"If the defendant appear before or be delivered to the court within sixty days of the findings of default, the court may remit part or all of any bond previously ordered forfeited by the courts.

"Evidence that the defendant is incarcerated or subject to court process in another jurisdiction on the day his appearance is required or a medical certificate from a duly licensed physician that the defendant was physically unable to so appear may be considered evidence of good cause why the recognizance should not be forfeited.

"If such recognizance so forfeited be not for such appearance, process thereon shall be issued from the court in which it was taken, or the court to which it was made returnable, and in a proceeding in one court on a recognizance entered in another a copy thereof shall be evidence in like manner as the

"original would be if it had been entered in the court wherein the proceeding is being had thereon.

"The foregoing provisions of this section shall not apply to a case in which the defendant posted a cash bond and the case is tried in his absence and the money so deposited disposed of by the court or judge in the manner prescribed by law. (Code 1950, §19.1-137; 1960, c. 366; 1962, c. 499; 1970, c. 371; 1973, c. 409; 1975, c. 495.)"

§19.2-145, Code of Va., states:

"How penalty remitted. - When in an action or scire facias on a recognizance the penalty is adjudged to be forfeited the court may on an application of a defendant remit the penalty or any part of it and render judgment on such terms and conditions as it deems reasonable. (Code 1950, §19.1-140; 1960, c. 366; 1975, c. 495.)"

Supreme Court of Virginia Rule 3:A29 states:

"(a) Right to Bail. - An accused who is held in custody pending trial for an offense shall be admitted to bail unless there is probable cause to believe that:

"(1) He will not appear for trial or

at such other time and place as may be directed, or

"(2) His liberty will constitute an unreasonable danger to the public.

"(b) Terms. - If the accused is admitted to bail, the terms thereof shall be such as in the judgment of the magistrate will be reasonably calculated to insure the presence of the accused, having regard to (1) the nature and circumstances of the offense, (2) the weight of the evidence, (3) the financial ability to pay bail, and (4) the character of the accused.

"(c) Appeal. - If a magistrate denies bail or requires excessive bail, an accused who is held in custody pending trial for an offense may petition successively the next higher authority up to and including the supreme court or a justice thereof. An accused who has been convicted in a court of record may seek a writ of error pursuant to Part Five of these Rules to the order of such court denying bail or fixing the amount of bail and, pending action by the Supreme Court, execution of the sentence may be postponed as provided in Rule 1:1.

"(d) Recognition of Witness. - If it appears that the testimony of a person is material in any criminal proceeding, the magistrate may re-

"quire him to give a recognizance for his appearance.

"(e) Forms; Conditions, Place of Deposit. - A person permitted to give bail shall sign a written recognizance for his appearance. The magistrate, having regard to the considerations mentioned in paragraph (b) of this rule, may require one or more sureties or other security, or may authorize the release of the accused without surety or other security. The magistrate shall advise a person admitted to bail of the penalties imposed by law for failure to appear.

"(f) Forfeiture. - If there is a breach of condition of a recognizance, the court in which the accused or other person is to appear shall declare a forfeiture and, provided the forfeiture is not set aside for good cause shown, shall on motion enter a judgment of default and execution may issue thereon.

"(g) Exoneration. - When the condition of the recognizance has been satisfied or the forfeiture thereof has been set aside or remitted, the court shall exonerate the obligors and release any bail. A surety may be exonerated by a deposit in the amount of the bond or by a timely surrender of the accused or other person into custody."

Also involved are the Fifth and Four-

teenth Amendments to the United States Constitution.

STATEMENT OF THE CASE

On March 18, May 6, and May 26, 1975, evidence was presented against the petitioner and the Circuit Court of the City of Norfolk made findings of guilty on thirteen indictments, the petitioner having waived trial by jury. On June 24, 1975, the pre-sentencing report was submitted to the Court and the Court sentenced the petitioner to confinement in the penitentiary on each of the thirteen indictments.

From these convictions and punishments, the petitioner gave notice of appeal to the Supreme Court of Virginia on July 17, 1975. Upon the petitioner's conviction and while awaiting appeal, bail was set at \$50,000.00. The peti-

tioner posted this amount through a bondsman, Jimmie Exum, as surety. Said bond contained the provision that the petitioner keep the peace and be of good behavior while free on bail. On January 2, 1976, the Supreme Court of Virginia found no reversible error in the proceedings below, refused a writ of error and supersedeas, thereby affirming the judgment of the Circuit Court of the City of Norfolk.

On January 29, 1976, the Supreme Court of Virginia stayed the execution of their judgment rendered January 2, 1976, in order that the petitioner may have reasonable opportunity to present to the Supreme Court of the United States a petition for a writ of certiorari to review the judgment of the Supreme Court of Virginia.

On April 1, 1976, a petition for certiorari to the Supreme Court of the United States was filed. On June 1, 1976 a petition for certiorari of this matter was denied by the Supreme Court of the United States.

On June 18, 1976, the petitioner was arrested again. Petitioner subsequently pleaded guilty to three felony charges.

On January 28, 1977, a hearing was had in the Circuit Court of the City of Norfolk and the bond in the entire amount of \$50,000.00 was ordered forfeited. No evidence was taken at the bond forfeiture hearing. The Court below simply took judicial notice of petitioner's guilty pleas. It is from this judgment that the petitioner appeals.

REASONS FOR GRANTING THE WRIT

I. The third condition of §19.2-135, Code of Va., that petitioner shall keep

the peace and be of good behavior until the case is finally disposed of is unconstitutional. To declare a forfeiture of a bond for \$50,000.00, where petitioner has always appeared in court to answer the charges, for violating the aforesaid third condition of the said statute deprives him of property without due process of law. Due process requires that a criminal statute give fair warning of the conduct which it prohibits. Bouie v. City of Columbia, 378 U.S. 347, 84 S.C. 1967, 12 L.Ed. 2d 894 (1964); Wright v. State of Georgia, 373 U.S. 284, 83 S.C. 1240, 10 L. Ed. 2d 349 (1963). A statute which prohibits conduct in vague and indefinite terms is unconstitutional. Farber v. Rockford, 407 F.Supp. 531 (D.N.D.Ill. 1975). A statute which forbids or requires that doing of an act in terms so

vague that men of common intelligence must necessarily guess at its meaning or differ as to its application violates due process of law. Cramp v. The Board of Public Instruction of Orange County, Florida, 368 U.S. 278, 82 S.C. 275, 7 L. Ed. 2d 285 (1961). The essence of the due process clause of the Fourteenth Amendment is that all persons are entitled to be informed as to what the State commands or forbids. Goguen v. Smith, 471 F. 2d 88 (C. A. 1 1972). Due process requires that the criminal statute set forth a comprehensible standard. Cicero v. Olgiati, 410 F.Supp. 1080 (D.S.D.N.Y. 1976); Coates v. Cincinnati, 402 U.S. 614, 91 S.C. 1688, 29 L.Ed. 2d 217 (1971). A statute is repugnant to the due process clause of the Fourteenth Amendment on its face, where

the specifications of details of the events intended to be charged will not serve to validate it. Lanzetta v. State of New Jersey, 306 U.S. 451 59 S.C. 618, 83 L.Ed.888 (1939). A criminal statute is void under the "void for vagueness doctrine" as denial of due process.

United States v. DeCadena, 105 F.Supp. 202 (D.N.D.Cal. 1952). A condition of probation that defendant is to conduct himself in such a manner that no one has any occasion to question whether or not he is violating the law was held so vague as to be unreasonable. Dulin v. State, Ind. , 346 N.E. 2d 748 (1976).

II. If §19.2-135, Code of Va. is constitutional, it was unconstitutional-ly applied against the petitioner.

At the hearing held on January 28,

1977 before the Circuit Court of the City of Norfolk on a scire facias hearing to forfeit the bond of \$50,000.00, the Commonwealth of Virginia failed to present any evidence in support of its scire facias. The Court took judicial notice that while petitioner was on bond, the petitioner committed certain criminal offenses for which he was later found guilty on a plea of guilty and sentenced to the state penitentiary. The Commonwealth offered no evidence that it had been damaged and merely relied upon the argument to the Court by an assistant Commonwealth's attorney. Counsel for petitioner, at page 11 of the transcript stated:

"I would like to interpose an ob-jection to forfeiting the bond on the basis that the condition that was attached to the bond and was in the bond itself and by implication in the statute itself, because the language is there also, is uncon-stitutional in that it deprives an

"individual of his property without due process of law."

The Court:

"I am going to let the record reflect your position and what you say. Of course, I think I have said exactly what the position of the Court is and why we take this step and we will order that a copy of the conviction in the other courtroom be placed in this file, though it is still only one Court with nine judges. That will be the disposition."

At page 5 of the transcript, counsel for petitioner stated to the Court:

"Your Honor, in this particular case, I think what we have is a bond for the appearance of an individual, without any doubt. There is no claim that he did not appear when he was to appear at any particular time. The statute has placed an additional condition on a bond, that a person be -- I don't know if the words are 'good behavior' or what it is. But it is in the statute there. As another condition of the bond. I would submit this, that in order for you to act on this, there would have to be evidence of that, instead of assertions by the Commonwealth's Attorney that he was not a person of good behavior at that particular time. In addition, I think the purpose of the bond is first of all to assure his presence before the Court at the time that the Courts are re-

"quired to take action on his case. If there is a lack of good behavior which would be a condition of the bond, I think it is necessary for the Commonwealth to show there are damages in connection with that, rather than saying, 'Well, \$50,000 is the amount to be forfeited.' The fact is he entered a plea of guilty to certain offenses and he's been punished in the sense that he's been sentenced. He hasn't served that sentence. But he has received a sentence for any conduct that he engaged in during the time he was out on this bond, any misconduct. To add in addition to that a penalty outside of that, for the purpose of the bond, I think is improper and I ask first of all that there be evidence, factual evidence submitted in support of this matter. And secondly, that they be required to show wherein damages lie to the Commonwealth of Virginia."

The trial court, i.e. Circuit Court of the City of Norfolk, Virginia, and the Supreme Court of Virginia should have construed §19.2-135, Code of Va. as meaning that upon a violation of one of the conditions subsequent to the taking of a recognizance, the bond may be revoked and the accused be taken into custody. Such a meaning would result in petitioner

being rearrested, which happened, his bond revoked. However, the bond in the sum of \$50,000.00 should not have been ordered forfeited.

Such an interpretation of forfeiture of the bond in its entirety may deprive every defendant in a criminal case of his right to bail. Any businessman, for example, who has been charged with a violation of the securities regulations statutes, who posts an appearance bond with a requirement to keep the peace and to be of good behavior awaiting the appeal, would be placed in a position of losing a substantial amount of his property. Would a defendant sign a lease, knowing that he may have to pay \$50,000.00 should ^{he} be forced to break it? Would a speeding or parking ticket place him in danger of losing his property?

CONCLUSION

It is respectfully submitted that

the petition for a writ of certiorari should be granted and that the judgment of the Supreme Court of Virginia should be reversed, with direction to dismiss the forfeiture of the \$50,000.00 bond or award him a new trial.

Respectfully submitted,



HOWARD I. LEGUM and
LOUIS B. FINE
Counsel for Robert
Casper Bisping

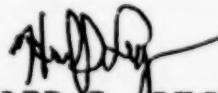
Fine, Fine, Legum & Fine
720 Law Building
Norfolk, Virginia 23510

Counsel for Petitioner

CERTIFICATE OF SERVICE

Pursuant to Rule 33, paragraph 3 (b), I certify that service was made on the respondent Commonwealth of Virginia by depositing three printed copies of the Petition for Certiorari in a United States mail box, with first class postage prepaid, addressed to John Marshall Coleman,

Attorney General of the State of Virginia,
at his post office address of Supreme
Court Building, Richmond, Virginia,
23219 this 8TH day of March,
1978.


HOWARD I. LEGUM
Attorney for Petitioner,
a member of the bar of
the Supreme Court of the
United States

VIRGINIA: In the Supreme Court of
Virginia held at the Supreme Court
Building in the City of Richmond on
Friday the 13th day of January, 1978.

Robert Casper Bisping and
Jimmie Exum,
Plaintiffs in error,
against Records Nos. 770579 and
770693

Commonwealth of Virginia,

Defendant in error.

Upon a writ of error and super-
sedeas to a judgment rendered by the
Circuit Court of the City of Norfolk
on the 28th day of January, 1977.

This day came again the parties, by
counsel, and the court having maturely
considered the transcript of the record
of the judgment aforesaid and arguments
of counsel, is of opinion, for reasons
stated in writing and filed with the
record, that there is no error in the
judgment complained of. It is there-
fore adjudged and ordered that the said
judgment be, and the same is hereby,
affirmed, and that the plaintiffs in

error pay to the defendant in error damages according to law, and also her costs by her expended about her defense herein.

Which is order to be certified to the said circuit court.

A Copy,

Teste:

Clerk

Defendant in error's costs:

Attorney's fee	\$ 50.00
Printing brief	80.00
Total	\$130.00

Teste:

Clerk

Present: I'Anson, C.J., Carrico, Harrison, Cochran, Harman and Compton, JJ.

ROBERT CASPER BISPING
and JIMMIE EXUM

v. Records No.
770579 and
770693

OPINION BY JUSTICE
ALEX. M. HARMAN,
JR.

COMMONWEALTH OF
VIRGINIA

January 13, 1978

FROM THE CIRCUIT COURT OF THE CITY
OF NORFOLK
Alfred W. Whitehurst, Judge

By a final order in this scire facias proceeding on January 28, 1977, the trial court ordered execution to issue on its judgment founded on forfeiture of two recognizances totaling \$50,000 executed by Robert Casper Bisping (Bisping or principal) and Jimmie Exum (Exum or surety). These recognizances, one in the amount of \$40,000 and the other for \$10,000, were executed to admit Bisping to bail pending appeal of his multiple felony convictions for sexual offenses against minor child-

ren. Bisping's petition to this court for a writ of error was refused on January 2, 1976, 216 Va. 1, and certiorari was denied by the United States Supreme Court on June 1, 1976, 426 U.S. 907.

While on bail pending appeal, Bisping committed three additional felonious sexual offenses against minor children. When the trial court was advised that Bisping had been arrested and charged with these additional offenses, it revoked Bisping's bail, recorded default and forfeiture of the recognizances, and issued a writ of scire facias against the principal and surety to show cause why execution should not issue on the judgment. However, final action on the scire facias was deferred pending judgment on the additional criminal charges.

On January 26, 1977, Bisping appeared before the trial court and entered pleas

of guilty to the offenses committed while on bail. As a result of his pleas, Bisping was convicted and sentenced to additional prison terms. After a hearing on the scire facias two days later, the trial court confirmed forfeiture of the recognizances and ordered that executions issue against both principal and surety.

Appellants first endeavor to mount a broad-gauge due process attack upon Code §19.2-135 for vagueness, relying on the Fifth and Fourteenth Amendments to the Constitution of the United States and Article I, Section 8 of the Virginia Constitution. Bisping alone argued that the good behavior condition in the bonds is also unconstitutionally vague.*

*One recognition was conditioned "upon the principal maintaining a peaceful and law-abiding life while free on bail" and the other "upon the principal maintaining a law abiding life while free on bail."

Code §19.2-135 requires that certain

conditions attach to and be incorporated in all recognizances executed before a judicial officer of Virginia. The appellants' attack is focused on one of those statutory conditions, i.e., that the principal "shall keep the peace and be of good behavior until the case is finally disposed of."

We will not entertain the constitutional attack on the statute under the long-established and well-settled rule that one who voluntarily proceeds under a statute and claims benefits thereby conferred will not be heard to question its constitutionality in order to avoid its burdens. Buck v. Kuykendall, 267 U.S. 307 (1925); Purcell v. Conrad, 84 Va. 557, 5 S.E. 545 (1888); Spindel v. Jamison, 199 Va. 954, 103 S.E.2d 205 (1958). Where one takes advantage of the provisions of a statute and a bond required by it is filed, the estoppel to question the

constitutionality of the statute extends not only to the principal, but also to his surety. Greene County v. Lydy, 263 Mo. 77, 172 S.W. 376 (1914); Musco v. United Surety Co., 196 N.Y. 459, 90 N.E. 171 (1909).

Since Bisping is estopped to attack the constitutionality of the statute, he is likewise estopped to attack the good behavior condition of the bond which substantially incorporated the condition required by the statute.

Here, as in the trial court, the appellants argue that there should have been no forfeiture of the recognizances because there was no failure on Bisping's part to observe the appearance condition of the recognizances. While appearance was an important condition of the recognizances, it was not the only condition. Both recognizances were specifically conditioned upon Bisping's good behavior while on

bail. Violation of this good behavior condition is the ground relied upon by the Commonwealth here, as well as in the trial court, to sustain the forfeitures. The additional crimes committed by Bisping while on bail clearly violated the good behavior condition of the recognizances, and forfeiture of the penalty provided therein was fully justified.

The question then becomes whether the trial court erred in failing to remit forfeiture of the whole or any part of the penalty fixed by the recognizances. In a proceeding for forfeiture of the penalty of a recognizance, Code §19.2-145 (1975 Repl. Vol.) grants our courts the power to "remit the penalty or any part of it and render judgment on such terms and conditions as it deems reasonable." This statute, which is an extension of the common law rule, invests our

courts with discretionary power to meet the exigencies of the particular case. Bowling v. Commonwealth, 123 Va. 340, 343 96 S.E. 739, 740 (1918).

The record here conclusively shows that the principal, while on bail, violated the specific good behavior condition of the recognizances by committing additional crimes of the same nature and character as his earlier convictions. No evidence was adduced at the scire facias hearing by either appellant in explanation, excuse, mitigation or palliation of the principal's flagrant violation of the condition. In such circumstances, we cannot say the trial court abused its discretion in failing to remit the whole or any part of the forfeiture.

On brief and at oral argument, Exum, for the first time, attempted to challenge the form of the final judgment order entered

by the trial court. Since this issue was neither raised before the trial court nor included in the errors assigned by Exum, we will not notice it now. Rule 5:21.

Affirmed.